IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 157

LEWIS M. STEVENS, Successor to Joseph Lawler as Secretary of Highways of the Commonwealth of Pennsylvania, and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Appellants

v.

J. K. CREASY, WILLIAM W. McNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY, on Behalf of Themselves and other property owners and lessees similarly situated, and JACK C. MARSHELL and ALICE E. MARSHELL, Appellees

On Appeal From the United States District Court for the Western District of Pennsylvania.

BRIEF FOR APPELLEES

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v.

J. K. CREASY, WILLIAM W. McNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY, on Behalf of Themselves and other property owners and lessees similarly situated, and JACK C. MARSHELL and ALICE E. MARSHELL, Appellees

On Appeal From the United States District Court for the Western District of Pennsylvania.

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. After the Courts of Pennsylvania have declined to construe a condemnation statute of Pennsylvania may the Federal District Court proceed to construe the statute and upon finding it to be repugnant to the Constitution of the United States enjoin its enforcement?

2. Was the District Court correct in enjoining the enforcement of a Pennsylvania Statute, known as The

Counter-Statement of Questions Presented.

Limited Access Highways Act of 1945, which purports to deprive owners of land abutting an existing highway of access to their lands without compensation but which nevertheless permits local municipal authorities, if they so desire, to pay such compensation, and the Secretary of Highways, if he so desires, to contribute to such payment?

3. Where, as Appellants concede, the right of Appellees to recover damages resulting from a taking of existing easements is "unsettled" and "amorphous" did not the District Court properly enjoin the taking?

4. After Allegheny County, an instrumentality of the Commonwealth, has condemned a right of way for a new highway, and damages have been assessed together with benefits, and compensation payable to landowners has been paid, may Appellants, also agents of the Commonwealth, now deprive said landowners or their successors of the benefit of access without further compensation?

COUNTER-STATEMENT OF THE CASE

Appellees will not materially challenge Appellants' statement of the case but respectfully suggest the following in preface thereto:

In 1949 Allegheny County, a municipal subdivision of the Commonwealth of Pennsylvania, purchased the necessary land and constructed a new airport called "The Greater Pittsburgh Airport". In connection therewith a new four-lane highway called "The Airport Parkway" was built from downtown Pittsburgh to the airport, a distance of about 20 miles.

The first 15 miles of this road was built by the Commonwealth as a limited access highway under the provisions of the Limited Access Highways Act of 1945. That five mile section of road is the highway to which access is in controversy in the case at bar. The County purchased or condemned the necessary property and built the five mile section of road as a general access highway. Appellees, or predecessors in title to appellees, were parties to the purchase or condemnation proceedings (R., 45). As required by the law of Pennsylvania* the Board of Viewers and the Court of Common Pleas, at that time, in determining compensation assessed not only damages but benefits accruing to land owners by the construction of the new highway.

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*Act of Assembly of 1929, Mar. 2, P.L. 1278, Article VII, Sec. 523, since superseded, P.L. 723 July 28, 1953, Article XXVI, Sec. 2613, 16 Purdons Penna. Statutes, Sec. 5613.

SUMMARY OF ARGUMENT FOR APPELLEES

Appelleees submit that the District Court acted with complete propriety in regard to the substantive law, procedure, and all considerations of comity, and should be sustained.

The state courts declined to pass upon the constitutionality of the act of assembly challenged by Appellees and declined to define Appellees' rights. The Court of Common Pleas of Dauphin County ruled, in effect, that Appellees must wait until they have suffered damages and then, with denial of access a *fait accompli*, they may enter the state courts to discover whether or not they may recover compensation. The Supreme Court of Pennsylvania affirmed that ruling.

The District Court thereupon exercised its jurisdiction and, upon a recognition of the irreparable and very substantial damages which all parties agree would be suffered by Appellees through enforcement of this statute and its possible subsequent invalidation, granted a permanent injunction.

An injunction is a proper remedy in the premises for at least three reasons. The District Court found that the statute as written does purport to deprive Appellees of the right of access from an existing highway to their lands adjoining the highway, a property right recognized generally throughout the United States and in Pennsylvania, without providing any compensation therefor. Appellees had called other flaws in the statute to the attention of the District Court, upon which that Court did not find it necessary to pass. The statute on its face reveals arbitrary and unreasonable discriminations

against Appellees in that they are denied compensation for the taking of a property right which in other instances has been paid by the Commonwealth; because the statute provides specifically for the payment of damages for the construction of a limited access highway but not for the designation of an existing highway as a non-access highway; and because the statute authorizes Appellant Secretary of Highways to contribute state funds to the payment of damages for the loss of access in such cases and to such an extent as his unlimited discretion dictates, provided that the political subdivision of the Commonwealth first assumes voluntarily the responsibility to pay damages. This last mentioned provision of the statute is an arbitrary delegation of power which cannot be justified and which is unparallelled in any statute known to Appellees.

When any governmental authority acts under eminent domain legislation, the land owner affected should see a clear, certain and prompt method of obtaining compensation. In the instant case, if Appellees are left to their remedy at law following condemnation, the statute may eventually be declared invalid, or the state withdraw; the law of Pennsylvania does not provide any clear and certain method in either event by which the damage Appellees will have suffered in the interim may be recovered.

Aside from the questions of the constitutionality of the statute complained of, all parties and the District Court construe the act to provide no compensation for loss of access unaccompanied by the taking of land. If this construction is correct, Appellees should be estopped, under the circumstances of the instant case. When the

five mile length of highway, which is concerned herein was built, the land needed therefor was condemned and paid for on the express understanding that the owners of abutting land would derive considerable commercial benefits from their position fronting on the new highway. Their damages at that time having been qualified by this benefit, equity insists that the same benefit can not now be removed by executive fiat without further compensation.

Although Appellants have referred to the theory that the Commonwealth of Pennsylvania has perpetually reserved 6% of all land for highway use, this theory has apparently not heretofore alone ever supported an uncompensated taking for highway use.

No severence of the unconstitutional portion of this statute can be effected in its application to Appellees because without the invalid portion the remainder provides no means of compensation for the loss of property rights to protect which rights this action was brought.

ARGUMENT

I. The Federal District Court Acted Properly in Construing the Legislation Under Attack After the State Courts Failed to Do So.

Both parties are agreed that the District Court had jurisdiction of the subject matter of this suit. (Appellants Brief, p. 12).

By its order of May 1, 1956 (R., p. 67) the District Court noted that a substantial federal question was involved in the suit and stayed all proceedings until "a definitive construction of the act . . . by the state courts be had." This procedure had been recommended by this Court in *Spector Motor Service Inc.* v. *McLaughlin*, 323 U.S. 101, 106 (1944).

Following the order of the District Court, Appellees, as plaintiffs, filed a suit for an injunction in the Court of Common Pleas of Dauphin County, Pennsylvania, which court has jurisdiction of cases brought against officials of the Commonwealth. Appellants filed a motion to dismiss in that court and after argument the Court of Common Pleas dismissed the suit (R., 71-74) with the conclusion that Appellees "had an adequate remedy at law", *i.e.*, the resort to viewers as provided by Pennsylvania law. Appellees appealed from that decision to the Supreme Court of Pennsylvania, which, after argument, affirmed without opinion. *Creasy v. Lawler*, 389 Pa. 635, 133 A. 2nd 178 (1957).

The Limited Access Highways Act of 1945, which Appellees attack, refers to the procedure to be followed for eminent domain that is set forth in the Act of Assembly of Pennsylvania of 1945, June 1st, P.L. 1242, Article

III, Sec. 301 et seq., (36 Purdons Pennsylvania Statute Annotated, Sec. 670-301 ff.) The pertinent sections ar appended hereto, pages 36 to 39. A study of Se tion 302 of that Act leaves Appellees greatly in doub as to the remedy available to them if the Secretar of Highways, by executive fiat, decrees the highway i question to be a limited access highway; possibly, unde the authority of Section 303 of the statute, the owne suffering loss of access may petition for the appoin ment of viewers by the Court of Quarter Sessions in h particular county. In other words, Appellees were re fused equity by the state courts on the assumptio that if they were damaged they would be free to initiat an action at law. In effect Appellees were told that the should give up their access to their own land, their home and businesses and then inquire whether they are t be compensated. The state courts never touched upo the nature of the damages to be suffered, nor the ques tionable sections of the statute regarding contributio to damages by the Secretary of Highways, and the specifically refused to answer the question characterize as pivotal by the District Court below; to wit: Whethe the loss of access unaccompanied by a taking of lan would be compensated for. The Dauphin County Cour said:

> "It is not for this court to determine whether a abutting property owner has a vested property righ to direct access to an existing free-access highway If such a right exists plaintiffs have a statutor remedy to protect that right. Should the Common wealth proceed then *at that time* plaintiffs will hav the right to proceed before viewers on the questio of their right to damages. In the ordinary cours

of the procedure provided by The Limited Access Highway Act they will have a right of appeal to the common pleas court and a jury trial and still later to have their rights adjudicated in the Appellate Courts. At all times their constitutional rights, *whatever they may be,* will be guarded and protected." (latter emphasis supplied).

Appellees respectfully request that this Court compare the opinion of the Common Pleas Court of Dauphin County, quoted above, with the late opinion of the Supreme Court of North Carolina, in *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. (2nd) 129, 133 (1957). In that case, similar to the instant case, the state court refused to enjoin enforcement of a statute comparable to the Pennsylvania statute now before the Court. The North Carolina court decided, however, as the basis of its refusal, that the land owner had an adequate remedy at law because his easement of access is a compensable property right:

"The right is in the nature of an easement appurtenant to the property and abridgement or destruction thereof by vacating or closing the street . . . may give rise to special damages compensable at law. . . . Interference with the easement, which is itself property is considered, pro tanto, a taking of the property for which compensation must be allowed . . ." (96 S.E. 2d at p. 133)

In short, the North Carolina courts in refusing the injunction eliminated the need for equitable relief by adequately defining the plaintiff's rights at law.

That Pennsylvania courts are not always so chary of defining property rights in equity actions is illustrated

by *Gardner v. Allegheny County,* 382 Pa. 88, 114 Atl. 2nd 491 (1955). That case concerned the flight of aircraft in and out of the same "Greater Pittsburgh Airport" concerned in the instant case. A property owner there was seeking an injunction, and damages for the deprivation suffered by him due to flights of aircraft over his home. Although the Supreme Court of Pennsylvania there, as here, refused to assess damages, the Court did, for the guidance of all parties, declare on the authority of *United States v. Causby* 328 U.S. 256 (1945) (382 Pa. at p. 116): "that flights over private land which are so low and so frequent as to be a direct and immediate interference with the enjoyment and the use of the land amount to a 'taking' ".

When the District Court referred parties in the instant case to the state courts, Appellees anticipated and, we presume, so did the District Court that the state courts would either grant us an injunction because of the flaws in the statute which we attack or refuse the injunction as did the North Carolina Court in the *Hedrick* case on ground that loss of access, as a property right, would be paid for. The state courts did neither; the injunction was refused, but Appellees were told that they must wait until after access has been taken from them—until their businesses are closed and they are evicted from their homes—before they may even inquire in the courts whether they are entitled to be compensated for this loss.

Appellees submit that, despite Appellants' argument on this point to the contrary, the state courts in the instant case have not construed the statute. Until the District Court granted the permanent injunction no

court had acted to assist either the property owner or the Commonwealth, the condemning authority, in determining their respective rights or liabilities arising from the deprivation of access. Appellees, of course, did not have to be told that the courts of the Commonwealth would be open to them if they believed that they had a grievance. The state courts gave Appellees no assurance beyond the already axiomatic one that if they have a legal cause they have a legal remedy. The result of the state decision, if allowed to stand unquestioned, would be that Appellants could proceed immediately to bar access of Appellees to their property from the parkway; Appellees would be evicted from their residences and their businesses closed, with no idea of whether or not the Commonwealth would be liable for damages, which have been estimated conservatively at $1,000,000 (R., 35). The state courts were not deterred in this finding by consideration of the generally accepted doctrine that a prime requirement of an eminent domain statute is the availability of a clear, certain and prompt method of payment. 29 C.J.S., Eminent Domain, Sec. 99.

The District Court made it perfectly clear that it endeavored to comply with the requirement of comity and prudence referred to by Appellants in their brief (Appellants brief, p. 23) Faced with the failure of the state courts to meet the issue and convinced on the stipulated evidence that Appellees would suffer irreparable damages if the act were enforced, before its constitutionality was clearly established, the District Court proceeded to construe the act. This procedure has been approved in the past and followed by Federal District Courts many times in the absence of a construction of

a statutory law by a state court: *U.S. v. Jones*, 229 F. (2nd) 84, C. A. 10, (1956); cert. den. 351 U.S. 939; *Capitol Records v. Mercury Records Corp.* 221 F. 2nd 657 C.C.A. 2 (1955). Other instances in which Federal District Courts have taken upon themselves to decide how a state court would interpret a statute if a controversy were brought before the state court in a form it considered justiciable are *Jacobs v. Camden Fire Insurance Association*, 135 F. Supp. 837, W.D.Pa. (1955); *Russo v. Merck & Co.*, 138 F. Supp. 147, D.R.I. (1956).

Even if the state courts had construed the statute and decided that it met the requirements of the Federal Constitution in all respects, such a finding would not bind the District Court in regard to Appellees' rights under the Constitution of the United States: *Morey v. Doud*, 354 U.S. 457, (1957). In the Doud case, plaintiffs entered the Federal Court to seek an injunction against the enforcement of a statute of Illinois. The Supreme Court of Illinois had earlier decided, in *McDougall v. Lueder*, 389 Ill. 141, 58 N.E. 2nd 899 (1955), that the act was constitutional; the District Court nevertheless held the act to be unconstitutional and its finding was sustained by this Court. The *Doud* case was not a novel departure; in *Webb v. S. Ry. Co.* 248 F. 618, 621, C.A. 5 (1918), cert. den. U.S. 518, a statute of Alabama was challenged in the Federal District Court. The court said:

> "The Supreme Court of Alabama has decided that the statute quoted is valid: Parnell v. Southern Railway Co., 74 S. 437. As the validity of the statute is questioned on the ground that it is violative of the Constitution of the United States, that decision is not conclusive."

In the instant case, Appellees came before the Federal District Court as citizens of the United States seeking that Court's protection against deprivation of their property without due process, against arbitrary and unreasonable discrimination and against the denial of equal protection of the laws. This is a proper case for the Federal Court, in its equity jurisdiction, to intervene and to enjoin enforcement of a state law.

II. Equity Properly Intervened to Enjoin Enforcement of the Limited Access Highways Act.

The Federal statute establishing the procedure under which Appellees acted (62 Stat. 968, 28 U.S.C.A. Sec. 2281) was enacted by Congress to provide persons in the situation of Appellees with protection against the effects of the enforcement of unconstitutional statutes by state officials.

An injunction lies to prevent the enforcement of an invalid eminent domain statute: "As a general rule the owner may by injunction restrain the taking or injury of his property where such taking or injury is under the authority of an invalid ordinance or restriction." 30 C.J.S. Eminent Domain Sec. 403, p. 124.

Though neither Appellees nor court below have placed particular reliance upon the point, it seems clear that this Court in the past has conditioned a refusal of equity in the Federal Courts upon the availability of an adequate Federal remedy at law. (See footnote, Appellants' Brief, p. 21). It would appear that even under a narrowed application of that rule it would be appropriate in this instance wherein the state courts are clearly not disposed to provide equitable protection for the property

rights of Appellees. See *Petroleum Company v. Commission*, 304 U.S. 209, (1938); *Di Giovanni v. Camden Insurance Association*, 296 U.S. 64, (1935); *CB&Q Railway Co. v. Osbourne*, 265 U.S. 14 (1924).

A condemnation statute which fails to provide certain and reasonably prompt compensation to the owner of the seized property is inoperative and will not support condemnation proceedings: 29 C.J.S., Eminent Domain, Sec. 99; *Bragg v. Weaver*, 251 U.S. 57, (1919); *Sweet v. Rechel*, 159 U.S. 380, (1895).

Authorities on the general subject of Eminent Domain agree that where, as in this case, the constitutionality of a condemnation statute is in serious doubt, the property owner concerned is entitled to an injunction pending resolution of the question of constitutionality: Jahr, *Law of Eminent Domain*, p. 435; 2 *Louis on Eminent Domain* (2nd Edition), p. 1351.

Where the right to damages in the event of a taking is not clear, certain and reasonably prompt in effect, equity should give relief. Appellees' right to compensation following deprivation of access in the present State of Pennsylvania law is certainly far from clear. Appellants' statement (Appellant's Brief, p. 39) that this question in Pennsylvania is "amorphous" and "unsettled" (p. 40) understates the existing confusion. The Court of Common Pleas of Dauphin County in the instant case denied an injunction, saying: "It is not for this Court to determine whether an abutting property owner has a vested property right to direct access to an existing free access highway". (R. p. 74). The same court a few months previously had said: "Clearly an owner of land cannot constitutionally be deprived of all access to his

premises without compensation. *In re Espenshade*, 69 Dauph. 90, (1956).

In *Breinig et ux v. Allegheny County* 332 Pa. 474, 480, 2 Atl. 2nd 842 (1938) the Supreme Court of Pennsylvania said:

> "When land is taken or purchased for highways, the abutting owner retains, as an incident to ownership of the remainder of his land, the right of access or of ingress and egress. This right cannot be taken from him unless compensation is made therefor under the law. It is a property right, protected by the constitution."

The same court, in *Cain v. Aspinwall-Delafield Co.*, 289 Pa. 535, 541, 137 Atl. 610 (1927) said that Appellants, as dominant tenants:

> "had the right to make reasonable changes in the surface of the highway which did not appreciably damage an adjoining lot owner, but they do not have the right to create conditions in the highway which damage such lot owner's property or which takes from it the right of ingress or egress."

In other cases, including *Walsh v. Scranton*, 23 Pa. Superior Ct. 276 (1903); and *Stuart v. Gimbel Bros.* 285 Pa. 102, 131 Atl. 728 (1926) the courts of Pennsylvania have time and again defined the right of access as a property right; on the other hand, in *Soldiers and Sailors Memorial Bridge Case*, 308 Pa. 487, 490, 162 Atl. 309 (1932) the Supreme Court of Pennsylvania held that a plaintiff whose access and light were reduced by the building of a bridge by the Commonwealth has no legal remedy. The court in that case held loss of access to be a consequential damage and not an actual taking. More

recently, in *Koontz v. Commonwealth* 364 Pa. 145, 147, 70 Atl. 2nd 308 (1950) the Supreme Court of Pennsylvania said: "It is, of course, not open to dispute that, before the Commonwealth can be made to answer, in the present state of the statute law (Sec. 304 of the State Highway Law of June 1, 1945, P.L. 1242), for damages in cases of highway improvement, there must have been a taking of the complaining property owner's land: (*Brewer v. Commonwealth*, 345 Pa. 144, 145, 27 A. 2nd 53)"

This Court will note that the courts of Pennsylvania have not agreed upon a definition of the right of access as a property right or as a incidental attribute which may be demolished without liability. In the cases in which compensation has been allowed the courts have emphatically defined access as an easement, a property right. In other cases it becomes a privilege to be denied for public convenience.

In summary, it appears that the courts of Pennsylvania have attempted to vary the character of a condemned property right or easement according to the identity of the condemnor, which, Appellees submit, is illogical and illegal. In view of this unsettled legal picture, an injunction is the obvious method by which Appellee's rights may be protected until their legal position is clarified.

Argument.

A. *If, as Appellants concede, the statute purports to destroy Appellees' existing access without compensation, it is a deprivation of property without due process.*

Appellants have maintained at all times that the Limited Access Highways Act of 1945 does not require the Commonwealth to pay Appellee any compensation for deprivation of Appellees' rights of access. The District Court agreed with this construction of the statute and held it invalid for that reason.

This Court has held in the past that governmental action can amount to a taking, compensable under the laws of eminent domain, without necessarily including the physical appropriation of land: *U. S. v. Causby*, 328 U.S. 256 (1945). The Supreme Court of Pennsylvania adopted the same point of view; *Gardner v. Allegheny County* 382 *Pa.* 88, 116, 114 Atl. 2nd 491 (1955). Throughout the United States, access over the years has come to be regarded as an easement which may not be taken any more than the land itself without compensation.

Appellees will not recapitulate in detail the exhaustive discussions of the evolution of the concept of access as a property right. Various articles and cases are cited in the opinion below, in Appellants' brief and herein. In 43 A.L.R. 2nd 1072, 1073, (note 4) this annotation appears:

> "The doctrine granting a right of access to abutting land owners does not appear to rest on too satisfactory a foundation either logically or historically but it has apparently gained such wide spread

acceptance that the chances of having it overturned altogether are remote."

In 39 C.J.S. Highways, Sec. 141, p. 1081, it is stated as a general proposition that: "an abutting land owner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right which cannot be damaged or taken from him without due compensation". See also 22 A.L.R. 942.

In *Muhlker v. Harlem Railroad Co.*, 197 U.S. 544, 571, (1905) Justice McKenna, after a long discussion of the rights of owners of land abutting public ways concluded that the easement of access appurtenant to an abutting lot is as much property as is the lot itself. As Appellants point out (Appellants' Brief, p. 50) the holding of the Muhlker case was considerably qualified by *Sauer v. N. Y.*, 206 U.S. 536, (1907). The Sauer case itself, however, had a long and interesting history following that decision. (See *Crane v. Hahlo*, 258 U.S. 142 (1921) in which it appears that the complaining property owner in the Sauer case eventually received compensation upon a different theory of law.) Justice McKenna, in dissenting from the Sauer decision said, on p. 559:

"I am not insensible of the strength of the reasoning by which this court sustains that conclusion, but certainly all lawyers would not assent to it. Indeed one must be a lawyer to assent to it. At times there seems to be a legal result which takes no account of the obviously practical result. At times there seems to come an antithesis between legal sense and common sense".

In any event the proposition for which the Sauer case stands, i.e., that a state court may define property rights and that the Supreme Court of the United States will not question such definition has obviously been strictly limited by such subsequent decisions as *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). That case is of course one of the milestones in the development of the protection afforded by the federal courts to private persons against the invasion of their rights by state legislatures under the guise of the police power. In that case this Court held that the State of Pennsylvania could not constitutionally under the aegis of the police power deprive the owners of unmined coal of their right to damage the surface of the land by removing the coal. Justice Holmes said (260 U.S. at p. 415): "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

In *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 302, (1905) this Court said:

> "The general doctrine is correctly stated in Dillon on Municipal Corporations: "For example, an abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundry lines. When he is deprived of such right of access, or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property."

Although Justice Holmes dissented in the *Muhlker* case, in *U.S. v. Welch*, 217 U.S. 333, 339, (1910) he stated

the opinion of the Court that a private right of way is an easement and is land, and that if it were destroyed for public purposes, such destruction "may as well be a taking as would be an appropriation for the same end."

As Appellants have pointed out in their brief, (p. 35) the requirements for compensation under eminent domain powers are substantially the same for the Federal government and for the Commonwealth of Pennsylvania; that is, neither is required by its organic law to pay "consequential damages" but is only required to pay for an "actual taking" of property. For this reason the case law governing the responsibility of the Federal Government quite logically may be applied to questions arising under the law of the Commonwealth of Pennsylvania.

The right of access of abutting owners has always been limited by "legitimate regulation"; *Donovan v. Pa. Co., supra.* The advent of the limited access highway or through-way, built for a particular purpose, to meet a new demand far removed from the ancient concept of a land service road,* has called for the reappraisal of the rights of owners of land vis-a-vis the fast-traveling public. The new developments in the law occasioned by this new concept of public or "socialized" traffic management have been explored in the last ten years in many law review articles and texts, some of which are cited in the opinion of the District Court. These articles represent several different points of view.

*18AmJur., EminentDomain, 1958 Supp.Sec. 185, note: " 'a land service road' has been used to describe the normal ordinary road or highway which is regarded as being intended primarily to enable abutting land owners to have access to the outside world, as distinguished from the limited access road which is a 'traffic service road' designed primarily to move through traffic'.

Argument.

Owen Clarke, in an article entitled, "The Limited Access Highway" 27 *Washington Law Review* 111 (1952) reviewed "the haphazard development of the law of right of access". He observes (p. 123) that "when highway authorities convert existing roads or streets into limited access facilities, abutting owners suffer special injuries in varying degrees. If there is a total blocking of access, obviously the land owner is entitled to compensation."

In an article entitled, "Freeways and the Rights of Abutting Owners", 3 Stanford Law Review 298, (1951), the author concludes that, upon the conversion of an existing highway into a freeway, (p. 302): "the damage to the [abutting] property owner is so severe that the courts have universally held that he is entitled to compensation. The public can only justify its act of completely shutting off land under the power of eminent domain."

The doctrine that access cannot be destroyed without compensation has been accepted by several different state courts since the development of the limited access concept and the raising of resultant problems comparable to the instant case: See *Carazella v. Wisconsin*, 269 Wis. 593, 71 N.W. 2nd 276, (1955); *State v. Clevenger*, 365 Mo. 970, 291 S.W. 2nd 57, (1956); *Hedrick v. Graham*, 245 N.C. 249, 96 S.E. 2nd 129 (1957).

The Supreme Court of Indiana in State v. Marion Circuit Court ... Ind. ..., 153 N.E. 2nd, 327 (Oct. 9, 1958) held that the easement of access is a property right which may not be taken without compensation. The Indiana statute operative in that case, the Limited Access Act of 1945, provided:

"for the purposes of this act such authorities of the state, county, city or town may acquire private or public property and property rights for limited access facilities and service roads including rights of access, air, view, and light by gift, devise, purchase or condemnation". (Burns' Sec. 36-3105, 1949 Replacement, Acts, 1945, ch. 245, Sec. 5, p. 1113).

The petitioners in that case, state authorities comparable to Appellants in the instant case, asserted, as do Appellants here, that compensation is required only where actual land is taken and is not required where damages resulted from a change in the method of the use of the property earlier obtained by the state. The Indiana Court decided otherwise.

It is especially interesting to note that the Indiana Court, and the condemning authorities, conceded in that case that the property owners could have enjoined the taking for which they were seeking damages, citing *Thomas v. Lauer*, 227 Ind. 432, 86 N.E. 2nd 71 (1949).

Appellants, in their brief (Appellants Brief, p. 40) pointed out that Appellees' rights of access may be conserved by the establishment of local service roads. Whether or not Appellees must suffer complete deprivation of access in order to be entitled to compensation is a question which need not be decided by this Court in view of the stipulation filed below (R., p. 45) that there will be no local service roads available to, at least, certain of the Appellees. The stipulated fact that action by Appellants under the statute will deprive some of Appellees of all access to a public highway from their land, renders Appellant's discussion of circuitous, indirect and alternative means of access beside the point in the instant case.

B. *The Limited Access Highways Act of 1945 Denies to Appellees Equal Protection of the Laws*

Section 8 of the Statute here under attack provides, inter alia, as follows:

> "For the purpose of *constructing* limited access highways, local service highways, or intersection streets or roads, the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided." (Emphasis supplied).

The statute expressly provides a procedure by which the Secretary of Highways may purchase property for constructing limited access highways; it is silent concerning his authority to purchase property upon conversion of an existing road to a limited access highway. It would appear that the legislature by this significant omission has placed a large class of land owners, including Appellees, beyond the pale.

Appellees believe that this language creates a completely arbitrary discrimination between owners of land abutting newly constructed highways and those abutting existing highways like the Airport Parkway which would be converted to a limited access highway by executive action. Although the Dauphin County Common Pleas Court said that Appellees herein would have a remedy at law, it appears to Appellees that this statute reveals no express procedure by which a land owner, upon deprivation of access alone, may bring a claim before a Board of Viewers. As we mentioned earlier, the state courts have merely pointed out to the parties the existing general law concerning the appointment of a Board of Viewers upon petition; but have Appellees

any real assurance that a Board of Viewers to whom they would eventually look for damages will not interpret the legislative omission as a specific denial of their right to initiate proceedings? "Inclusio Unius Est Exclusio Alterius". Appellees' right are no less "unsettled" or "amporphous" than is the law in Pennsylvania to date concerning deprivation of access.

Another discrimination appears when the present statute is compared with the act which authorized the Pennsylvania Turnpike, a pioneer in the development of limited access: Act of May 21, 1937, P.L. 774, No. 211, (36 Purdons Pennsylvania Statutes Annotated Section 652, et seq.) By that statute the Turnpike Commission was authorized and empowered to acquire by condemnation: "Any lands, rights, easements, franchises or other property deemed necessary or convenient for the construction or efficient operation of the turnpike in the matter hereafter provided." The General Assembly thus provided for compensation to property holders for damages arising from the loss or deprivation of access. The discrimination appears when we compare the quoted language of the Turnpike law with another clause of the same section 8 of the Limited Access Highway Act: "The Commonwealth shall not be liable for consequential damages where no property is taken". There is no reasonable distinction between property owners who reside along a non-access highway entitled The Pennsylvania Turnpike and property only a few miles distant along a highway known as the Greater Pittsburgh Airport Parkway.

There is a third and, appellees believe, a most extreme discrimination, practically unparalleled in the law, in Section 8 of the Limited Access Highways Act.

"The Commonwealth shall not be liable for consequential damages where no property is taken; Provided, however, that the Secretary of Highways shall have authority to enter into agreement for the sharing of the cost of property damages with the officials of any political subdivision of the Commonwealth, which assumes such responsibility by proper resolution or ordinance".

That section authorizes the Secretary of Highways to pay damages for the loss of access in some cases but not in others. If municipal authorities decide that they have a moral obligation to pay for the loss of access, or a political obligation, or a personal favor to pay, they may make their municipality liable for payment of said damages, and the Secretary of Highways may decide to contribute funds of the Commonweatlh to such payment. What is or is not a compensable property right then will be determined in each instance by the discretion of local political authorities. Access may thus be a compensable property right in one land-owner and not in his neighbor. Such a flagrant statutory authorization of discrimination seems unique in the history of the law of eminent domain. It is a reasonable interpretation of the statute to predict that local policy will favor friends and punish enemies with complete freedom by resolving to pay or not to pay for the taking of access.

The fortunate owners of abutting property who would be compensated for their loss of access would be those with sufficient political or other influence upon local governing bodies to prevail upon them to pass the required "proper resolution or ordinance". No chopping of logic can justify this wholesale delegation to any person or agency. Furthermore, the statute is silent regarding what proportion of damages the Secretary may de-

cide to pay in the instances where contribution is made. Here again the political status of individuals affected and other factors completely beyond the control of the law may govern.

It might well be argued that when the legislature conferred this privilege upon the Secretary of Highways it recognized, in a sort of left-handed way, that such right of access is a compensable property right; otherwise why permit such payment, even on a discriminatory basis?

This indefensible discrimination between owners itself would be sufficient to refute Appellants' argument that the police power will support the statute under attack. The police power does not justify arbitrary discrimination anymore than it justifies deprivation of property, as set forth earlier. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, (1922).

This court will not interfere with a legislative classification which is based upon any reasonable difference: *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, (1955); but as this Court said in *Morey v. Doud*, 354 U.S. 457, 464:

> "'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 37-38, 48 S. Ct. 423, 425, 72 L. Ed. 770; Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459, 462, 57 S. Ct. 838, 840, 81 L. Ed. 1223. . . . A statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found. Smith v. Cahoon, 283 U.S. 553, 51 S. Ct. 582, 75 L. Ed. 1264."

Appellants brush over this point with almost unseemly haste, (Appellants' Brief, p. 64) by comparing it with another statute, that of June 1, 1945, P.L. 1242, Sec. 523, (36 Purdons Pa. Statutes Annotated, Sec. 670-523). The comparison fails immediately upon reading of the latter statute which assures the affected property owners of damages, from one source or another; whereas the Limited Access Highway Act makes recovery contingent upon not just one, but two completely voluntary acts; first, that of the governing body of the particular township, borough, city or county in which the conversion from general access to limited access takes place, and second, that of the Appellant Secretary.

C. *Appellees Should Not Be Relegated to Their Remedy at Law, Even if One Exists, at the Expense of Irreparable Damage.*

By stipulation (R. p. 45) the fact is before the Court that deprivation of access between their abutting properties and the Airport Parkway would cause immediate and substantial damages to Appellees amounting in many cases to eviction.

This Court has held that persons in a position comparable to Appellees herein need not allow themselves to be subjected to great expense and inconvenience through the operation of a state law because they have a theoretical remedy at law. Although Appellants have attempted to distinguish the case, that is the clear holding of *Toomer v. Witsell,* 334 U.S. 385 (1948). For those Appellees who reside on the parkway and have no other means of ingress or egress to and from their properties the only alternative to eviction is to remain upon the

premises and to continue to go to and from their properties onto the highway in defiance of the order of Appellants, thus risking arrest and criminal penalties. We submit that they are not obliged to undergo that absurd ordeal, and the fact that the criminal penalties involved are less drastic than those which concerned the court in the *Toomer* case does not affect the principle.

The proposition that the theoretical availability of a remedy at law should not bar one from equity has been followed universally, but Appellees respectfully call to the Court's attention some cases of particular interest in relation to the instant case. In *Smith v. Shiebeck*, 180 Md. 412, 24 A. 2nd 795 (1942) an injunction was granted preventing a private person from obstructing plaintiff's means of access to a highway via a private road. The court was persuaded by the argument that, although plaintiffs would have had an unquestioned right to recover damages at law, the denial of access would have resulted in an immediate increased fire hazard, would have prevented physicians from reaching the premises conveniently and would have hampered commercial deliveries to the residence and farm of plaintiff. The parallel to the instant case is easily perceived. In an older case, *Del Monte Livestock Co. v. Ryan*, 24 Colo. App. 340, 133 Pac. 1048, (1913) the Colorado Court granted an injunction to prevent the condemnation of a right-of-way because the condemnation would have blocked plaintiff's route to water for his cattle. Although (133 Pac. at p. 1050) "Counsel for appellees vigorously urges that both the statutory and general remedy for damages are open to appellants" the court held, citing several authoritative texts, that an injunction should issue in the face of any irregularity in condemnation proceedings

until the right to make such entry has been perfected y a full compliance with the constitution and the laws".

A modern case is *Thomas v. Lauer*, 227 Ind. 432, 439, 6 N.E. 2nd, 71, 73 (1949): "The owner of such land or ight is not required to stand idly by and watch a state gency take his property and destroy his business be- ore taking any steps to protect himself."

Appellees apprehend that condemnation proceed- ngs under the authority of the statute which we attack nay expose them to great and irreparable damages. If he injunction now restraining Appellants were removed. Appellants will immediately bar Appellees from access o the Parkway, with the immediate damages resultant which have ben described heretofore. We have adverted arlier to the confused state of the law of Pennsylvania oncerning access; the holdings of the Supreme Court of ennsylvania in such cases as *Koontz v. Commonwealth*, 61 Pa. 145, 70 Atl. 2nd 308 (1950) and *Soldiers and ailors Memorial Bridge Case*, 308 Pa. 487, 162 Atl. 309 1932), that loss of access by itself is not compensable, ould, on their face, authorize a board of viewers, and he Court of Common Pleas, to whom an appeal from the oard of viewers lies, to refuse any award. The omission y the legislature of authority to purchase property ffected by designation, as contrasted with construction f a limited access highway, would also seem to forbid n award to petitioning Appellees. An adequate test of he statute could not be obtained until the case pro- ressed to the Appellate Courts, and quite possibly to his Court via certiorari; the statute would, then, not e declared invalid until taken before the highest courts.

There is an alternative possibility. Appellees may, after following the same long route to the Appellate Courts, be awarded damages. In that event it is not at all unlikely that the damages payable would prove so great (R., p. 35) that the administrative authorities would determine to abandon the project.

The law of Pennsylvania does not give Appellees, in either situation described above, any clear right to recover damages which they would have suffered by the temporary eviction from their homes and abandonment of their businesses. During the interim in either eventuality all such damages would have resulted from a temporary destruction of the incorporeal hereditament of access. Although there are cases in Pennsylvania in which damages have been allowed in the event of discontinued or abandoned condemnations (see *Reinboldt v. Commonwealth*, 319 Pa. 33, 179 Atl. 581 (1935); *Phila. v. Commonwealth*, 284 Pa. 225, 130 Atl. 491 (1925); Philadelphia Appeal, 364 Pa. 71, 70 A. 2nd 847 (1950); in other situations the appellate courts of Pennsylvania have said that, without a physical taking of land, upon abandonment of a condemnation no damages will be paid: *Detweiler v. Williamsburg Borough*, 116 Pa. Superior Ct. 21, 175 Atl. 748 (1935). As a general rule, an owner cannot recover damages after abandonment where there has been no actual taking of the property: 30 C.J.S., Eminent Domain, Sec. 339, p. 15.

III. Appellants Are Estopped to Deny Access to Airport Parkway to Appellees.

Although estoppel does not apply generally against state officials it has been held to lie in a proper case in Pennsylvania. In *Commonwealth ex rel Margiotti v. Union Traction Co.*, 327 Pa. 497, 194 Atl. 661 (1937) the court said that laches estops even the Commonwealth (p. 522): [Citing an earlier case]

"After persons have acted 'on the faith of the grants of the state, authenticated by the highest evidence known to the law, she is certainly bound by an estoppel founded upon the purest equity. As against such parties she must be deemed cognizant of the acts of her agents' ".

In an annotation at 1 A.L.R. 2nd, 347 it appears that a state may be estopped "when the acts of its public officials alleged to constitute the grounds of estoppel are done in the exercise of powers expressly conferred by law and when acting within the scope of their authority. [Citing cases]".

The parties hereto have stipulated that, at the time Allegheny County condemned the original right-of-way for that section of the airport parkway particularly concerned in this appeal "it was the contention of the County that consideration should be given to the special benefits which it claimed said persons would derive by reason of having frontage on a new highway and direct ingress and egress thereto and therefrom". (R. p. 45, 46). The portions of testimony abstracted from hearings before the Board of Viewers and before the Court of Common Pleas of Allegheny County which are now be-

fore this court. (R., 46 to 61), the arguments of counsel and statements by the Common Pleas Court, (R., p. 61-64) all demonstrate that the condemning authority forcefully placed this consideration before the Board of Viewers and before the Trial Court.

In Pennsylvania a county is a political subdivision of the state: *Commonwealth v. Walker*, 305 Pa. 31, 156 Atl. 340 (1931); *Pa. Turnpike Commission Condemnation Case*, 347 Pa. 643, 32 A. 2nd 910 (1943). The Commonwealth of Pennsylvania, through Allegheny County, at the time of the seizure of lands where this highway is located assured abutting owners in the most emphatic form that they would have access to the new highway. There can be no disputing the fact that if at the time of the original taking the county had conceded the possibility or probability that access to the new highway would subsequently be barred to abutting land owners, this concession would have been an important element in the computation of damages. To allow Appellants who are, no less than the county authorities, agents of the Commonwealth, to confiscate the right of access now without payment, would be grossly unfair and, from a common sense point of view, even fraudulent. In this regard a statement of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, (1922) is interesting: "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for." Appellees have not been paid for the loss of the right of access; Appellants insist that they will not be paid and that they have no right to be paid. Considering these facts, this Court would be amply justified in holding Appellants estopped, aside from every other question in this case.

IV. The "6% Theory" Will Not Sustain Any Taking of Property Without Payment.

In Appellants' brief there is considerable discussion of the curious doctrine, in Pennsylvania law, that all original patentees received their land from the Commonwealth subject to a 6% reservation for highway purposes. Because of the lack of definition of this doctrine in its application to particular cases, and the highly dubious status of any reservation of 6% through many subsequent conveyances since the original patents, it will be apparent to this Court that the "6% doctrine" cannot be raised to any diginity higher than an anachronistic curiosity in the legal history of Pennsylvania. Appellees have not found any cases, including those cited by Appellants, in which this doctrine standing alone is the *ratio decidendi* of a holding refusing compensation in a condemnation proceeding.

The cloud on Appellants' theory is demonstrated by the fact that the Courts of Pennsylvania have upon occasion referred to it even in cases involving condemnation by municipal subdivisions, e.g., *Herrington's Petition*, 266 Pa. 89, 109 Atl. 791 (1920), while they have in cases substantially parallel granted not only direct but consequential damages: *Pusey v. City of Allegheny*, 98 Pa. 522, (1881); *Chester County v. Brower*, 117 Pa. 647 12 Atl. 577, (1888).

Further, the justification underlying the 6% reservation as discussed in the cases cited by Appellants is the benefit of the roads to be built to the one whose land is used. It is a clear non sequitur to argue that because the state may build a road across a person's land without payment therefor, that the state may then bar his

access to the road. Appellants can hardly assert that the early reservation of 6% entitles the agents of the Commonwealth thereafter in perpetuity to arbitrarily confiscate property and property rights of any kind from freeholders. Upon analysis, the 6% doctrine appears to be employed by the Pennsylvania courts as a makeweight to bolster any decision in which, in condemnation proceedings, a land owner may seem to be inadequately compensated. It should not be resurrected and raised to a greater dignity today.

V. There Can Be No Severance of the Invalid Portions of the Statute.

The holding of the District Court is explicit in application in that Appellants are enjoined from interfering with or depriving Appellees of their rights to ingress and egress to and from the Airport Parkway. (R. p. 104) This is based upon a finding that insofar as the Limited Access Highways Act of 1945 permits such interference or deprivation, it is unconstitutional. No other action by Appellants has been enjoined. They are free to proceed with any highway construction or development which does not deprive an abutting owner of an existing easement of access to the highway from his land.

Furthermore, no dissection could cure the trouble here because the statute then would need new provisions which would assure compensation to Appellees and those in similar situations in accordance with the principles set forth in the constitutional decisions, and the text book authorities referred to by the Court below in its opinion. The provision for compensation in

seizure cases must be "certain and reasonably prompt." 29 C.J.S. Eminent Domain, Sec. 99.

From C.J.S., Vol. 82, Sec. 93, subject "Statutes," we quote:

> "Sustaining the constitutional part while the unconstitutional part falls has been held possible only where it is not necessary to insert words or terms to separate the constitutional part and give effect to it alone . . ."

CONCLUSION

For the foregoing reasons the final decree of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

State Highway Law of 1945

ARTICLE III.—EMINENT DOMAIN; ASCERTAINMENT AND PAYMENT OF DAMAGES

SECTION 301.

Before the department shall undertake the construction, reconstruction, or improvement of any State highway, wherein a change of width or of existing lines and location is necessary, and damage is likely to result to abutting property, it shall notify the county commissioners of the proper county in writing of the contemplated change in such existing width, lines, and location. After the county commissioners have agreed to such changes or refused to agree thereto as hereinafter provided, the department may proceed with the work of construction, reconstruction, and improvement.

SECTION 302.

After the receipt of the notice as above provided, the county commissioners, if they approve such change of width or of existing lines and location, and agree thereto in writing, shall, when possible, enter into an agreement with the owner or owners of said property as to amount of damage to be paid to said owner or owners. Whenever the amount so agreed upon shall exceed the sum of three hundred dollars ($300.00) the same shall not be paid by the county until the proposed agreement shall have been filed by the county commissioners in the office of the prothonotary of the county in which the property damaged is situated. If no exceptions are filed thereto within ten (10) days after notice

given by publication as hereinafter provided, the county commissioners may pay the amount so agreed upon. If exceptions thereto are filed within ten (10) days after such notice, the proceedings shall be presented to the court of quarter sessions for its approval. The court shall fix a time for hearing the matter, at which time the parties to such agreement and any taxpayer interested therein and their witnesses shall be heard, and the court shall either approve or disapprove the agreement as it deems proper. If the court disapproves the agreement, it shall indicate a sum which it would approve for such case if the county commissioners and the property owner could agree thereon. In such cases, if the property owner and the county commissioners agree on the amount of damages indicated by the court as acceptable to it, such agreement may be entered into and shall be final and binding on the parties without any further approval by the court. Notice of the filing of such agreement in the office of the prothonotary and of the time and place of hearing in all such cases shall be given by one publication in one or more newspapers of general circulation throughout the county, which shall state that any taxpayer may file exceptions to the agreement, or may appear at such hearing and be heard, together with his witnesses, as the case may be.

SECTION 303.

In case an agreement satisfactory to the county commissioners and said owner or owners cannot be made and the approval of the court thereto secured, the owner or owners of said property damaged thereby or the commissioners of the proper county may present their petition to the court of quarter sessions for the appoint-

ment of viewers to ascertain and assess such damages, as well as any benefits. Such petitions shall be presented within six (6) years from the date of the approval by the Governor of the plan making the change, but not thereafter.

In assessing the damages, the viewers shall take into consideration the advantages derived from such road passing through the land of the complainant. The viewers shall make report in writing to the court of quarter sessions within the time fixed by the court in its decree appointing the viewers, or such extension thereof as the court may allow. At the end of thirty (30) days after the filing of the report, if no exceptions thereto have been filed, the report shall be confirmed absolute by the court, without waiting until the next term of court. If all parties in interest waive the thirty (30) day period before confirmation absolute, and shall in writing agree to have the report of the viewers confirmed absolute at any time before the expiration of the thirty (30) day period, the court may enter confirmation absolute accordingly. The county commissioners, or any other party to such proceedings, may within thirty (30) days after the filing of the report of the viewers, appeal from the award of the viewers to the court of common pleas, and shall be entitled to a trial by jury. From the judgment of the court of common pleas, an appeal may be had to the Supreme Court as in other cases. Such damages, when ascertained, shall be paid by the county in which the State highway is located.

Whenever the county commissioners do not consent to or approve any such change of width or of existing lines and location, and the secretary determines

such change to be necessary, he shall, when possible, enter into an agreement with the owner or owners of said property as to the amount of damages to be paid therefor, and if agreed upon, such damages shall be paid by the Commonwealth out of moneys in the Motor License Fund. If such agreement cannot be made, the owner or owners of said property damaged thereby or the Commonwealth may present their or its petition to the court of quarter sessions for the appointment of viewers to ascertain and assess such damage, as well as any benefits, within the same time in the same manner and wth the same right of appeal to the owner or owners and to the Commonwealth as is hereinbefore provided in cases where the county agreed to such change. The damages, when ascertained, shall be paid by the Commonwealth out of moneys in the Motor License Fund.